No. 10930

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EIVIND ANDERSON and CONTINENTAL CASUALTY COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA for the use and benefit of A. G. RUSHLIGHT & CO., a corporation, and the FIRST NATIONAL BANK OF PORTLAND, OREGON, a National Banking Corporation, and W. L. REID, doing business as W. L. REID COMPANY,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

CHARLES H. LEAVY, *District Judge*

Reply Brief of Appellants

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Ray Printing Co.—Tacoma

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TEXTBOOKS AND STATUTES

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In view of the disparity between certain statements and conclusions, made by appellees in their brief, and the record, we have numbered this brief in the same order as appellees' brief in the hope that this procedure would facilitate the work of the court.

I.

The appellees in their brief set out a counter statement of the case and cite as authority for the counter statement certain portions of the District Court's Findings, contradicted testimony of in-

terested witnesses, and in some instances no supporting testimony of any kind. So that this court will have the benefit of our analysis of this counter statement, we will discuss several material statements made by the appellees to show that there is no foundation to the counter statement. It is also important to note that Finding of Fact X, relied upon by appellees in support of their counter statement is assigned as error and should not be regarded as conclusive, insofar as this appeal is concerned.

On page 4 of their brief, appellees state that Ex. 11, Tr. 94 is a change order. The preceding letter of appellee, Ex. 10, Tr. 93, reads in part as follows:

> ". . . we would appreciate a *change order from you covering additional costs of this work* and instructions to proceed with the construction of the Power Plant as revised."

The exhibit in question (Ex. 11, Tr. 94) reads as follows:

"Rushlight, A. G.

May 22, 1941

A. G. Rushlight & Co.
407 S. E. Morrison Street
Portland, Oregon

Gentlemen:

"In reply to your letter of May 21, you

are advised that the Government has approved the change in the Power Plant of the 400-Bed Hospital Project at Fort Lewis in accordance with my proposal submitted May 2, 1941. This change involves revision in mechanical equipment, including the foundation and boilers.

"You are hereby instructed to make the necessary changes in the mechanical installation involved by the change in the Government plans and specifications as may be affected by your subcontract.

"In accordance with our previous understanding, you are to furnish a breakdown statement showing the different items on the Plumbing, Steam Heat, and Hot Air Heat installation. Will you please forward this information immediately in order to permit me to furnish certain information required under my contract with the Government, giving also a separate breakdown on steam distribution. Your prompt attention to this matter is essential.

Very truly yours,

EIVIND ANDERSON.

EA/b

(Endorsed): Filed Apr. 6, 1944."

It is to be noted that there is nothing in Ex. 11 *covering additional costs of this work* as requested by appellee, and the president of appellee admitted that he never construed it as a change order, agreeing to pay for any extra work. Appellee's president testified, Tr. 157, as follows:

"Q. And at that time you were asking him for—to, in July, you were asking him to accept the price on the revisions?

"A. Yes, we were asking him to give us a written order for them.

"Q. And he never did so, did he?

"A. He ignored it. He never declined or *never agreed to.* He just simply ignored them."

The most that can be said for Ex. 11, is that it is an instruction to proceed. In view of the magnitude of the job and the very short time allowed for the performance, it is in no wise inconsistent with the present position of appellant that he should give an order to proceed with work that the appellee was obligated to perform.

With regard to the last paragraph of Ex. 11, requesting a breakdown of the contract price, that had nothing to do with an extra, but was required by the express terms of the subcontract. Ex. 7, Tr. 80 reads as follows:

"Paragraph 5. The sub-contractor will furnish the contractor within five (5) days from the date of this agreement, a breakdown of the sub-contractor's contract price to establish basis of payment."

The inclusion of the item in question in the breakdown of the contract price negatives the present claim that it was intended to be an extra.

Appellees, on page 6 of their brief, place considerable stress on Ex. 4. Ex. 4 was never in fact used or submitted to the army. Tr. 249.

It is stated on page 7 of appellees' brief that appellant should have used the words "substituted" or "sub" specifications in the sub-contract. An examination of the documentary evidence passing between the parties at the time, clearly shows that neither appellant nor appellee used the words "substituted" or "sub" specification but continually referred to the boiler change as "revised" or "revision."

Ex. 4 (1st sheet), Tr. 129, prepared by appellant, uses the word "revisions."

Ex. 4 (2nd sheet), Tr. 130, prepared by appellee, uses words "revisions" and "revised."

Ex. 12, Tr. 98, prepared by appellee, uses word "revisions."

Ex. 10, Tr. 93, prepared by appellee, uses word "revised" twice.

Ex. 11, Tr. 94, prepared by appellant, uses word "revision."

Throughout this interchange of communications both appellant and appellee referred to the boiler change as "revised" or "revision" and never as "substitute" or "sub" specifications.

In spite of that usage of the word "revised" appellees state on page 9 of their brief that the word "revised," which was written on appellees' bid, Tr. 85, by its president, meant a drop in price and not a change in plans. This is inconceivable in view of the common usage of the word, by the parties, to denote the change in the type of boilers. However it must fail for an additional reason, which is that there never was a bid made by appellee for $300,000.00, hence there couldn't be a revised bid price.

Rushlight testified, Tr. 116:

> "Q. I will ask you whether or not you made a proposal to him in connection with the plumbing and heating on that job, prior to the time that he bid—he gave his bid to the government?
>
> "A. Yes, I made him a definite proposal on the plumbing and heating prior to the time he made his bid to the government on this four hundred-bed hospital job."

and in Tr. 161:

> "Q. Do you claim you submitted a written bid to Mr. Anderson of it prior to that time?
>
> "A. Yes, he had a copy of this same proposal here as of April 3, 1941, calling for the three hundred thousand dollar price."

and in Tr. 162:

"Q. You want it understood you submitted this bid to Mr. Anderson prior to the opening of the bids?

"A. Yes."

In answer to a question by the court, Rushlight testified about the alleged bid of $300,000.00 as follows, Tr. 180:

"The Court: Do you have a copy of it?

"A. No, we don't keep copies of these because they are not in contract form. They are just proposals. We have a master copy of—those are made off of, but we couldn't keep copies of each individual one."

The above testimony of Rushlight was categorically denied by appellant. In addition to this, Clyde Philp, who drove appellant and Rushlight to the bid opening, testified as follows, Tr. 449, 450:

"Q. Now then you recall of driving them to Fort Lewis with Mr. Rushlight and Mr. Anderson?

"A. Mr. Anderson and Mr. Rushlight drove to Fort Lewis with me.

"Q. And they drove in your car?

"A. That is right.

"Q. And I will ask you whether you recall whether Mr. Rushlight asked Mr. Anderson what his bid was?

"A. Mr. Rushlight was asking Mr. Anderson what the low plumbing figure was that he had used.

"Q. Yes, and what did Mr. Anderson tell him?

"A. Well, Mr. Anderson—there was a little kidding going on there and Mr. Anderson told him that—'why didn't you prepare a figure for me?' or words to that effect.

"Q. Anderson asked him why he did not prepare a figure?

"A. Yes, sir.

"Q. And what did Mr. Rushlight say?

"A. And Mr. Rushlight said he didn't get out a close bid on this one, but if he got the job he would talk to him afterwards.

"Q. He said that he did not get out a close bid on it but if Anderson got the bid Rushlight would talk to him afterwards?

"A. That is right."

It is clear from the testimony that there was no prior bid of $300,000.00 made by Rushlight and his story that he did not keep copies of bids involving such a sum as $300,000.00 is little short of fantastic. It is also important to note that the bid price for plumbing and heating contained in the breakdown of the original bid of appellant was not $300,000.00 but $286,000.00. Ex. 28.

It is clear that the counter statement of the case is not a correct summation of the evidence in the case but is a theory advanced by appellees contrary to the greater weight of the evidence.

II.

The appellees take the position that the decision is right as a matter of law. They cite the rule that, "it is fundamental that all prior conversations and negotiations are merged in the final written contract," in support of their position. While we have no quarrel with that rule, the appellees did not rely on that rule in the District Court, but on the contrary introduced all types of extraneous and irrelevant matter and an examination of their statement of the case indicates they are still relying on the same evidence in this appeal.

Appellees take the position that because Exhibit 7 did not use the word "sub" specification, it did not include the revised boilers. The materials to be furnished and work to be done as defined by Exhibit 7, was the plumbing, heating and mechanical installation. Tr. 72. It specifically refers, among others, to M. E.-1, which reads as follows:

> "M. E.-1, *Scope of work*: This section of the specification includes the furnishing of all labor, materials, *equipment*, etc., that are necessary for the complete installation of *all mechanical equipment* required in connection with the *Boiler*

House and Distribution System. The *system* shall be *delivered complete*, in perfect working order in full accordance with the intent and meaning of the plans and *specifications* and to the *complete satisfaction of the C. Q. M.*". Exhibit 2, M. E.-1.

It is clear that the subcontract contemplated that appellee would furnish and install boilers described in the plans and satisfactory to the Construction Quartermaster. As we pointed out in our opening brief, the appellee knew prior to making the subcontract and also prior to submitting his proposal marked "revised" that revised plans had been made and submitted to appellee, showing that the type of boilers had been changed and that these were the only ones which would be satisfactory to the Construction Quartermaster.

The appellees take the position that since the specifications for the revision M. E.-1 (sub) to M. E.-14 (sub) were not specifically mentioned in the contract that the revised boilers did not have to be furnished.

It is obvious from an examination of the subcontract that the appellee was obligated to install a set of boilers. The only question is which set of boilers was it required to install?

If Exhibit 7 were the only contract between the parties, the court might arrive at the conclusion that the original boilers were to be installed.

However, at the time Exhibit 7 was made, there was already a binding contract between the parties to install the revised boilers and deduct the cost of them from the appellees' contract price. Exhibit 17. The appellee does not take the position that Exhibit 7 superseded, modified or rescinded Exhibit 17. Therefore it must be in full force and effect and appellee must have known when he entered into the subcontract for $293,000.00 that appellant was entitled to deduct the cost of installation of the revised boilers, as the same officer had executed Exhibit 17 only a few days prior to the execution of Exhibit 7.

Thus when the two contracts are construed together the only conclusion that can be reached is that the appellee was required to install the revised boilers or more correctly stated was to have the cost of the installation deducted from his contract price, which had not as yet been reduced to writing.

Exhibit 4, upon which appellees place so much reliance, had been prior in time to both Exhibit 7 and Exhibit 17 and would, under appellees' own rule of law be merged in those agreements.

The letter from Rushlight, Ex. 10, upon which appellees rely, and the answer, Exhibit 11, would not alter the contract between the parties and were, as a matter of fact, only a part of a premeditated

plan to construct a basis for this present action.

While it would have undoubtedly prevented this action for appellant to have included the matter of the boiler revision in the sub-contract, he was no doubt justified in believing that Exhibit 17, plus the word "Revised" on appellees' bid, Exhibit 8, were sufficient.

It is a general rule of law that where more than one instrument is written between the same parties concerning the same subject matter they should be considered together even if not executed on the same day. In the case at bar there were nine days between the execution of Exhibit 17 and Exhibit 7.

> "The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eyes of the law, one instrument. Moreover, when two instruments are entered into between the same parties concerning the same subject matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract and interpreted together. A transaction constituting a contract must be considered as a whole, even though it consumed more than one day, the date of the writings constituting such transaction being immaterial." 12 Am. Jur., p. 782, Sec. 246.

It is the appellees' contention that the parties

contracted to install the old rather than the revised boilers. Such a contention is not sound or reasonable in view of the fact that all of the parties knew of the change prior to the date of the subcontract.

It is a fundamental rule that contracts must be given a fair and reasonable interpretation.

> "In the transactions of business life, sanity of end and aim is at least a presumption, though a rebuttable one. A reasonable interpretation will be preferred to the one which is unreasonable. When the evidence of the agreement furnished by the contract itself is not plain and unmistakable, but is open to more than one interpretation, the reasonableness of one meaning as compared with the other and the probability that men in the circumstances of the parties would enter into one agreement or the other are competent for consideration on the question as to what the agreement was which was written establishes." 12 Am. Jur. p. 792, Sec. 250.

The appellees next contend that the most that can be said is that the contract was ambiguous. We submit that when exhibit 7 is construed with exhibit 17, there is no ambiguity.

Nor is the rule on interpretation by the parties any more favorable to appelles than to appellant. The appellant at all times before and after the work in question was performed, refused to agree to pay any extra for it. This is admitted by W. A.

Rushlight, the president and chief witness for appellees. Tr. 157.

> "Q. And at that time you were asking him for—to, in July, you were asking him to accept the price on the revisions?
>
> "A. Yes, we were asking him to give us a written order for them.
>
> "Q. And he never did so, did he?
>
> "A. He ignored it. He never declined or never agreed to. He just simply ignored them."

The appellee, however, construed its contract to require the installation of the revised boilers and they were in fact installed. The actions of the parties speak louder than their words, particularly where, as here, the words of appellee were spoken with the thought in mind of laying the groundwork for a claim for extras. We submit that the interpretation of the parties favor the position of appellant and not the position of appellee.

The appellees infer that since the government treated the boiler revisions separately that their contract should be treated in the same way. The evidence is uncontradicted that the contract and the revision were made the same day, May 6, and both prior to the execution of either Ex. 7 or 17. The only reason the government treated the revision separately was a matter of accounting pro-

cedure. There is no showing here of an intent by the parties to treat these matters separately or that for some reason of accounting practice they determined to do so. In the absence of such a showing, the burden of proof being on the appellees, it must be assumed there was no such intent.

III.

The appellees are correct when they state, "the court based its decision almost entirely on questions of fact." As a matter of fact, the District Court in its decision ignored many of the fundamental rules of law which, had they been properly applied, the appellants here would not have been required to seek relief in this court.

Some of these facts upon which the District Court relied are set out in appellees' brief commencing on page 23. The first, concerning the intent of the parties, was in direct conflict. In spite of the fact that the testimony was evenly balanced between two interested parties, the District Court ignored the question of burden of proof and held for appellees.

The statement of the District Court to the effect that the only thing that gave him any concern was that the proposal of May 9, Ex. 8, is marked "revised," Tr. 396, is indicative that he did not consider Ex. 17, in connection with Ex.

7, to determine its meaning.

The finding that the word "revised" written on appellees' bid by Mr. Rushlight meant a revision in price rather than a revision in plans or work, violated several rules of law. The testimony on the matter was evenly balanced and again the appellee had the burden of proof; an officer of the appellee had written it there and it should have been construed against the appellee; the parties had used the word "revised" many times previously to mean revised plans or work; there was no substantial evidence of a prior price to revise; and the construction given was not a reasonable one.

The appellees, on page 24 of their brief, quote a portion of the District Court's statement with regard to the credibility of the appellant. The balance of the statement is as follows:

> "On the other hand if we adopt the testimony of Mr. Anderson then Mr. Rushlight's evidence and that of his witness, Hall, is not worthy of credence." Tr. 391, 2.

The District Court immediately thereafter found that appellee never submitted a bid prior to the bid opening in the sum of $300,000.00 or in any sum. Tr. 392. Yet appellees are still here contending they did and the witness Rushlight many times testified he did. Tr. 116, 161, 162.

IV.

The appellees take the position that the appellant testified falsely because the District Court found against him. We submit that is not the test. The mere fact that the District Court made Findings of Fact inconsistent with the testimony of appellant as well as with the appellees' witness, Mr. Rushlight, does not mean that appellant testified falsely. Our examination of Mr. Anderson's testimony as a whole shows that he did not in fact testify falsely.

However, an examination of Mr. Rushlight's testimony indicates that his memory was very poor, except when testifying to some point in which he was vitally interested. We point out a few instances which illustrate this point:

Rushlight testified:

> "Yes, sir, I was in error, and the only thing I could do since my memory is refreshed by these specific cases is to say to you I was in error—my testimony was wrong, to be honest and proper with this court." Tr. 422, 423.

Although Mr. Rushlight testified to details that occurred at the meeting of May 9, he was unable to state where he came from or how he got to Tacoma on that important occasion. Tr. 423.

> "Q. Mr. Rushlight, you and Mr. Hall came

to Tacoma on May 9 to Mr. Anderson's house?

"A. Yes, sir, I believe that was the date, Mr. Peterson.

"Q. And where did you come from?

"A. Well—

"Q. To Tacoma.

"A. I don't recall where we came from now, Mr. Peterson.

"Q. I will ask you whether or not you lived at Portland?

"A. Yes, sir.

"Q. And you came up to Seattle on the train, did you?

"A. I don't recall how we got up there.

"Q. Well, do you recall whether you contacted Clyde Philp on May 9th at Seattle, and asked him to haul you to Tacoma?

"A. No, I don't remember that.

"Q. Huh?

"A. I don't believe that is so, not to the best of my recollection."

and on Tr. 424, the witness testified:

"Q. Who was present at the Anderson house that night?

"A. Well to the best of my recollection there was Mr. Anderson's son who testified in this case, Mr. Anderson and his wife and daughter and Mr. Hall.

"Q. Was Clyde Philp there?

"A. I don't recollect—I don't believe Mr. Philp was there. I don't recollect Mr. Philp being there."

Mr. Philp, who was a partner with Mr. Rushlight on certain construction jobs, testified that he drove Rushlight and Hall to the meeting and was present all during the conversations. Tr. 434, 435.

An examination of that portion of Mr. Rushlight's testimony, which appears in the Transcript, will indicate several other instances where his memory was faulty and where he was manufacturing the whole cloth. Under these circumstances the appellees' charge that appellant was giving false testimony appears to be another case of the pot calling the kettle black.

The appellees state that because the Findings were based on controverted evidence, they are conclusive. As a matter of fact most of the evidence on which the Findings were based were irrelevant. However, the contracts between the parties, Ex. 7 and 17, and the testimony of Mr. Wyatt were not contradicted and are sufficient to sustain appellant's position that these boilers were not an

extra. The rule cited, we submit, is inapplicable here.

V.

The appellees state: "(1) That the substituted or revised work was not mentioned in the proposal of May 9, Ex. 8." That proposal is the one that bears the word "revised" in Mr. Rushlight's own handwriting.

The appellees also state: "(3) was not actually formally ordered by the government until 'Change Order A,' Ex. 26, dated May 23." This is contrary to the evidence of Col. E. P. Antonovich, the Contracting Officer, a witness called by appellees. Tr. 267.

The appellees state: "(4) That this change order revision was treated as a separate independent item and extra, throughout, by both the government and these parties." There is no evidence that the appellant treated this item as an extra at any time.

The statement that Ex. 11 is a change order is likewise incorrect. As previously stated in this brief, the most that can be said of that exhibit is that it is an instruction to proceed. There is no agreement or inference in that exhibit that appellant would pay extra for this work. The president of appellee admitted he never construed it to

be an agreement to pay any extra cost, Tr. 157. Counsel cannot now repudiate his client's position and take a contrary position.

The explanation given as to the reason for the purchase of the boilers from the Roy T. Early Co. on May 6 is indicative of appellees testimony throughout, but it does not explain away the fact that at the time the subcontract was entered into Rushlight knew that appellant was entitled to deduct therefrom the cost of the revised boilers, in the sum of $16,924.00 paid to Early for the boiler installation, by the appellant. Ex. 17, Tr. 212-216.

Counsel seems to feel agrieved that we take the position that appellees did not install the revised boilers and that they were in fact installed by the Roy T. Early Co. However, they do not contend that Early did not in fact supply and install the boilers, but claim they furnished some of the incidental parts. An examination of Ex. 7, shows that appellee was to furnish all of the mechanical equipment as well as the Plumbing and Heating and it is not surprising they did furnish incidental items. However, they never furnished the revised boilers but Early did and received his $16,924.00 contract price from the appellant for so doing.

Counsel has not even seen fit to discuss the authorities cited in the opining brief. In spite of this, those authorities lay down the rules of law

applicable in this case and we submit they should be followed in this case.

V (2)

The appellees' position with regard to the contract requirement of filing a claim within one week is difficult to follow and is confusing. They do not claim waiver of the provision and admit it is enforceable. In spite of that, at no time do they inform us when a claim was filed but refer us to Exhibit 4, Exhibit 10, and Exhibit 11, none of which are, or purport to be, a claim, such as is contemplated by the subcontract. Ex. 7, Tr. 76.

Exhibit 4 was executed prior to the time appellant had any contract with the government, and was by appellees' own admission nothing but a proposal. Tr. 126.

Exhibits 10 and 11 might be construed as an order in writing under Sec. 4 of the Subcontract, reading in part as follows:

> ". . . no charge for extras shall be paid to the subcontractor unless ordered in writing by the General Contractor . . ." Ex. 7, Tr. 74.

However, they could not be deemed to comply with Sec. 5 (b), reading as follows:

> "To make all claims for extras of every kind and nature in writing within one week from the date that said claimed extra is in-

curred." Ex. 7, Tr. 76.

It is immaterial here whether the week commenced on May 6, or on May 15, or when the work was done, as there is no evidence of a claim being submitted within one week from any of those dates. As stated in appellant's opening brief, with reputable authority cited, such a showing is a condition precedent to recovery.

Nor can such a contract provision be ignored by saying that ". . . the owner was at all times fully advised in writing on this point and himself gave the extra order."

The provision relative to orders in writing (Sec. 4) and the provision relative to claims (Sec. 5), are independent and must both be complied with. It is not sufficient to comply with one or the other.

VI

Throughout this brief we have called this court's attention to errors and inconsistencies contained in Finding of Fact X. It would only lengthen this brief without adding anything new to repeat them. We decline to unnecessarily burden this court with such repetitive matter and refer to the preceding portions of the brief in this connection.

SUMMARY

The appellees have failed to answer in their brief the questions involved in this appeal and have ignored the authorities cited in support of appellant's contentions. It must be assumed, therefore, that they are unable to answer the questions or distinguish the authorities.

The position taken by appellees, that the item in question was an extra as a matter of law, rests wholly upon the assumption that there is an ambiguity and that the contract should be construed against the appellant for the reason that the contract was prepared by him. That position is untenable when the surrounding circumstances and the contract with Early, Exhibit 17, are considered.

The position that the item was an extra as a matter of fact is contrary to the documentary evidence and the admission of knowledge of the revisions prior to the execution of the subcontract.

The failure of appellees to prove the filing of a written claim for extras within one week after the claimed extra was incurred likewise is a conclusive answer to the contentions of appellees.

CONCLUSION

It is apparent from the District Court's opinion

that the correct conclusion on this matter became lost in a multitude of conflicting evidence. However, the documentary evidence and the uncontradicted evidence on the surrounding circumstances should be more than adequate to establish that the item involved was required by the contract and did not constitute an extra. In addition the appellees are precluded by failing to file the necessary claims.

We submit that the District Court should be reversed and the item appealed from should be disallowed.

Respectfully submitted,
DUPUIS & FERGUSON,
Attorneys for Appellants.